

HOUSE BILL 2945
By Fitzhugh

AN ACT to amend Tennessee Code Annotated, Title 56, Chapter 3, Part 1, relative to insurance compliance self-evaluative audits.

BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF TENNESSEE:

SECTION 1. Tennessee Code Annotated, Title 56, Chapter 3, Part 1, is amended by adding thereto the following as a new section:

(a) As used in this section:

(1) "Insurance compliance audit" means a voluntary, internal evaluation, review, assessment, or audit not otherwise expressly required by law of a company or an activity regulated under Title 56, or other state or federal law applicable to a company, or of management systems related to the company or activity, that is designed to identify and prevent noncompliance and to improve compliance with applicable statutes, rules, or orders. An insurance compliance audit may be conducted by the company, its employees, or by independent contractors.

(2) "Insurance compliance self-evaluative audit document" means documents prepared as a result of or in connection with and not prior to an insurance compliance audit. An insurance compliance self-evaluation audit document may include, but is not limited to, as applicable, field notes and records of observations, findings, opinions, suggestions, conclusions, drafts, memoranda,

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drawings, photographs, computer-generated or electronically recorded information, phone records, maps, charts, graphs, and surveys provided that this supporting information is collected or developed for the primary purpose and in the course of an insurance compliance audit. An insurance compliance self-evaluative audit document may also include any of the following:

(A) An insurance compliance audit report prepared by an auditor, who may be an employee of the company or an independent contractor, which may include the scope of the audit, the information gained in the audit, and conclusions and recommendations, with exhibits and appendixes;

(B) Memoranda and documents analyzing portions or all of the insurance compliance audit report and discussing potential implementation issues;

(C) An implementation plan that addresses correcting past noncompliance, improving current compliance, and preventing future noncompliance; or

(D) Analytic data generated in the course of conducting the insurance compliance audit.

(3) "Company" means an insurance company, insurance agent, broker, producer or limited insurance representative, health maintenance organization, a hospital and medical service corporation or other entity authorized to conduct business pursuant to this title.

(b)(1) An insurance compliance self-evaluative audit document is privileged information and is not admissible as evidence in any legal action in any civil, criminal, or administrative proceeding, except as provided in subsections (c) and (d) of this section. Documents, communications, data, reports, or other information created as a result of a

claim involving personal injury or workers' compensation made against an insurance policy are not insurance compliance self-evaluative audit documents and are admissible as evidence in civil proceedings as otherwise provided by applicable rules of evidence or civil procedure, subject to any applicable statutory or common law privilege, including but not limited to the work product doctrine, the attorney-client privilege, or the subsequent remedial measures exclusion.

(2) If any company, person, or entity performs or directs the performance of an insurance compliance audit, an officer or employee involved with the insurance compliance audit, or any consultant who is hired for the purpose of performing the insurance compliance audit, may not be examined in any civil, criminal, or administrative proceeding as to the insurance compliance audit or any insurance compliance self-evaluative audit document, as defined in this section. This subsection (b)(2) does not apply if the privilege set forth in subsection (b)(1) of this section is determined under subsection (c) or (d) not to apply.

(3) A company may voluntarily submit, in connection with examinations conducted under this title, an insurance compliance self-evaluative audit document to the commissioner, or his or her designee, as a confidential document under Section 56-1-411(f) without waiving the privilege set forth in this section to which the company would otherwise be entitled; provided, however, that the provisions in subsection (f) of Section 56-1-411 permitting the commissioner to make confidential documents public pursuant to subsection (d) of Section 56-1-411(f) and to grant access to the National Association of Insurance Commissioners shall not apply to the insurance compliance self-evaluative audit document so voluntarily submitted. Nothing contained in this subsection shall give the commissioner any authority to compel a company to

disclose involuntarily or otherwise provide an insurance compliance self-evaluative audit document. To the extent that the commissioner has the authority to compel the disclosure of an insurance compliance self-evaluative audit document under other provisions of applicable law, any such report furnished to the commissioner may not be provided to any other parties, shall not be considered a public record for any purposes and shall be accorded the same confidentiality protections as provided above for voluntarily submitted documents. Any use of an insurance compliance self-evaluative audit document furnished as a result of a request of the commissioner under a claim of authority to compel disclosure shall be limited to determining whether or not any disclosed defects in an insurer's policies and procedures or inappropriate treatment of customers has been remedied or that an appropriate plan for their remedy is in place.

(c)(1) The privilege set forth in subsection (b) of this section does not apply to the extent that it is expressly waived in writing by the company that prepared or caused to be prepared the insurance compliance self-evaluative audit document.

(2) In a civil or administrative proceeding, a court of record may, after an in camera review, require disclosure of material for which the privilege set forth in subsection (b) of this section is asserted, if the court determines one of the following:

(A) The privilege is asserted for a fraudulent purpose;

(B) The material is not subject to the privilege; or

(C) Even if subject to the privilege, the material shows evidence of noncompliance with state or federal statutes, or state or federal rules or orders and the company failed to undertake reasonable corrective action or eliminate the noncompliance within a reasonable time of completion of the self-evaluative audit.

(3) In a criminal proceeding, a court of record may, after an in camera review, require disclosure of material for which the privilege described in subsection (b) of this section is asserted, if the court determines one of the following:

(A) The privilege is asserted for a fraudulent purpose;

(B) The material is not subject to the privilege;

(C) The material contains evidence relevant to commission of a criminal offense under Tennessee law, and all of the following factors are present:

(i) The commissioner, district attorney general, or attorney general has a compelling need for the information;

(ii) The information is not otherwise available;

(iii) The commissioner, district attorney general, or attorney general is unable to obtain the substantial equivalent of the information by any means without incurring unreasonable cost and delay.

(d)(1) Within thirty (30) days after the commissioner, district attorney, or attorney general makes a written request by certified mail for disclosure of an insurance compliance self-evaluative audit document under this subsection, the company that prepared or caused the document to be prepared may file with the appropriate court a petition requesting an in camera hearing on whether the insurance compliance self-evaluative audit document or portions of the document are privileged under this section or subject to disclosure. The court has jurisdiction over a petition filed by a company under this subsection requesting an in camera hearing on whether the insurance compliance self-evaluative audit document or portions of the document are privileged or

subject to disclosure. Failure by the company to file a petition waives the privilege for this request only.

(2) A company asserting the insurance compliance self-evaluative privilege in response to a request for disclosure under this subsection shall include in its request for an in camera hearing all of the information set forth in subsection (d)(5) of this section.

(3) Upon the filing of a petition under this subsection, the court shall issue an order scheduling, within forty-five (45) days after the filing of the petition, an in camera hearing to determine whether the insurance compliance self-evaluative audit document or portions of the document are privileged under this section or subject to disclosure.

(4) The court, after an in camera review, may require disclosure of material for which the privilege in subsection (b) of this section is asserted if the court determines, based upon its in camera review, that any one of the conditions set forth in subsection (c)(2)(A) through (C) is applicable as to a civil or administrative proceeding or that any one of the conditions set forth in subsection (c)(3)(A) through (C) is applicable as to a criminal proceeding. Upon making such a determination, the court may compel only the disclosure of those portions of an insurance compliance self-evaluation audit document relevant to issues in dispute in the underlying proceeding. Any compelled disclosure will not be considered to be a public document or be deemed to be waiver of the privilege for any other civil, criminal, or administrative proceeding. A party unsuccessfully opposing disclosure may apply to the court for an appropriate order protecting the document from further disclosure.

(5) A company asserting the insurance compliance self-evaluative privilege in response to a request for disclosure under this subsection (d) shall

provide to the commissioner, district attorney, or attorney general, as the case may be, at the time of filing any objection to the disclosure, all of the following information:

- (A) The date of the insurance compliance self-evaluative audit document;
- (B) The identity of the entity conducting the audit;
- (C) The general nature of the activities covered by the insurance compliance audit; and
- (D) An identification of the portions of the insurance compliance self-evaluative audit document for which the privilege is being asserted.

(e)(1) A company asserting the insurance compliance self-evaluative privilege set forth in subsection (b) of this section has the burden of demonstrating the applicability of the privilege. Once a company has established the applicability of the privilege, a party seeking disclosure under subsection (c)(2)(A) or (C) of this section has the burden of proving that the privilege is asserted for a fraudulent purpose or that the company failed to undertake reasonable corrective action or eliminate the noncompliance within a reasonable time of completion of the self-evaluative audit. The commissioner, district attorney, or attorney general seeking disclosure under subsection (c)(3) of this section has the burden of proving the elements set forth in subsection (c)(3) of this section.

(2) The parties may at any time stipulate in proceedings under subsections (c) or (d) of this section to entry of an order directing that specific information contained in an insurance compliance self-evaluative audit document is or is not subject to the privilege provided under subsection (b) of this section.

(f) The privilege set forth in subsection (b) of this section shall not extend to any of the following:

(1) Documents, communications, data, reports, or other information created independently of an insurance compliance self-evaluative audit required to be collected, developed, maintained, reported, or otherwise made available to a regulatory agency pursuant to this title, or other federal or state law, rule, or order;

(2) Information obtained by observation or monitoring by any regulatory agency; or

(3) Information obtained from a source independent of the insurance compliance audit.

(g) Nothing in this section shall limit, waive, or abrogate the scope or nature of any statutory or common law privilege including, but not limited to, the work product doctrine, the attorney-client privilege, or the subsequent remedial measures exclusion.

SECTION 2. This act shall take effect upon becoming a law, the public welfare requiring it.